

REGULATING “ATYPICAL” WORKING

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I. INTRODUCTION

There has been a rapid growth in recent years in various “non-standard” or “atypical” forms of working, variously defined as any form of working that is not performed under a permanent full-time contract of employment. Closely associated with competitiveness, flexibility and adaptability, at least a third of new engagements are now to some form of temporary job. In excess of 1.5 million workers in the United Kingdom work under a variety of temporary arrangements, including part-time, casual, on-call or fixed-term contracts, as a consequence of which they may fall outside the main body of employment protection legislation.¹ Although eligibility for employment protection is no longer subject to an hours threshold² temporary workers may fall outside the main framework for a number of reasons: they may not be employed under a contract of employment, and therefore not be an employee³ or may fail to accrue sufficient continuous employment.⁴

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¹ F.Sly, and D.Stillwell, “Temporary workers in Great Britain” *Labour Market Trends*, (September, 1997) at pp.347-354.

² The Employment Protection (Part-time Employees) Regulations 1995, S.I. 1995/31, which has now been consolidated into the relevant sections of the Employment Rights Act 1996 [E.R.A. 1996].

³ The E.R.A. 1996 s.230.

⁴ The E.R.A. 1996 ss.108 and 155 respectively required a period of two years’ continuous service to be eligible to bring proceedings for unfair dismissal and the right to a redundancy payment. This period was reduced to one year in connection with unfair dismissal only where the effective date of termination falls on or after 1st June, 1999, Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999.

Nearly 7.5 *per cent* of workers in the United Kingdom work under a fixed-term or task-based contract.⁵ Whilst many organisations operate such contracts, and have traditionally done so to meet seasonal and short term demands, the increasing trend towards fixed-term and task-based contract working reflects a shift in the preference of employers for a smaller core workforce. However, fixed-term contract working is increasingly evident in public-sector, where in excess of 50 *per cent* of those working on fixed-term contractual arrangements are employed, and amongst white-collar workers: almost a third of those working on fixed-term contract arrangements fall within the classification of professional employees, which includes teachers and lecturers.

One of the attractions of fixed-term contracts for employers has been that domestic legislation⁶ has provided that certain fixed-term contracts were an exception to the general rule, contained in the Employment Rights Act 1996, section 203(1), that any agreement to exclude or limit the operation of any provision of the 1996 Act or preclude a person from bringing any proceedings under the 1996 Act before an employment tribunal is void.⁷ It was, therefore, the case that although non-renewal of a fixed-term contract is "dismissal" under the 1996 Act⁸ a waiver clause, agreed to during the term of certain fixed-term contracts, was capable of successfully ousting the jurisdiction of employment tribunals in proceedings for both unfair dismissal and for the right to receive a redundancy payment.⁹

A change to this position was signalled in the White Paper *Fairness at Work*¹⁰ and at the level of the European Communities, by the draft Framework Agreement on fixed-term work reached by the social partners in January, 1999. However, despite subsequent legislation, contained in the Employment Relations Act 1999, section 18(1)-(5), and adoption by the European Commission of a Council Directive giving effect to the Framework Agreement,¹¹ domestic case law regarding these ouster clauses remains relevant.

⁵ Made up of 6.5% men, 8.4% women. The percentage in Germany is 11.6% and Spain 32.4%. 304 *E.I.R.R.*, (May, 1999) at p.17.

⁶ The E.R.A. 1996, s.203(2)(d).

⁷ The E.R.A. 1996, s.203(1)(a) and (b). The name of industrial tribunals was changed to employment tribunals under Employment Rights (Dispute Resolution) Act 1998 and brought into force from 1st August, 1998 by Employment Rights (Dispute Resolution) Act (Commencement No. 1 and Transitional and Savings Provisions) Order 1998, S.I. 1998/1658.

⁸ S.95(1)(b) and 136(1)(b).

⁹ S.197(1) and (3) respectively.

¹⁰ Cm. 3968, May, 1998.

¹¹ Directive 1999/70/EC.

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Although the Court of Appeal in *British Broadcasting Corporation v. Kelly-Phillips*,¹² expressed a desire to “keep it simple” by the operation of the “celebrated dictum” of Lord Denning in *British Broadcasting Corporation v. Ioannou*,¹³ which has the advantage of certainty and thus predictability, the court found themselves unable to agree with the “Denning test.” They preferred instead the observations of the majority of the Court of Appeal in *Ioannou*, and those of Sir Brian Hutton in the Northern Ireland Court of Appeal in *Mulrine v. University of Ulster*,¹⁴ and did so despite recognising that this may have provided a potential for abuse.

Prior to the most recent changes, the position facing judges in the United Kingdom has been that in order to come within the E.R.A. 1996, sections 94 and 135, the right for British workers not to be unfairly dismissed and to be paid a redundancy payment on dismissal for redundancy, it is necessary for a “dismissal,” as opposed to a consensual termination, to have occurred. Since at common law the ending of a contract merely by the effluxion of time involves a consensual termination, by the E.R.A. 1996, sections 95(1)(b) and 136(1)(b), expiry of a fixed-term contract “without being renewed under the same contract” is deemed to be a “dismissal.” Such a dismissal is capable of being unfair under general principles and of giving rise to the duty to make a redundancy payment in the same way as dismissal under a contract of an indefinite duration.

However, unlike contracts of employment of indefinite duration, by the E.R.A. 1996 section 203(2)(d), a fixed-term contract that falls within the definition contained in section 197(1) or (3) is not rendered void by the general principle against “contracting out” of the provisions of the 1996 Act contained in section 203. Section 197(1) provides that Part X of the 1996 Act, which contains the right to claim unfair dismissal, does not apply to dismissal from employment under a contract for a fixed-term of one year or more if:

“(a) the dismissal consists only of the expiry of that term without it being renewed, and before the term expires the employee has agreed in writing to exclude any (such) claim.”

It is therefore the case that although non-renewal of a fixed-term contract is a “dismissal” for statutory purposes, where the contract is for one year or more and where during the currency of the contract the employee has agreed to a waiver

¹² [1998] I.R.L.R. 294, [C.A.].

¹³ [1975] I.R.L.R. 184, [C.A.].

¹⁴ [1993] I.R.L.R. 545, [N.I.C.A.].

clause, there is no right to claim unfair dismissal in the event of non-renewal of the contract.

In addition, section 197(3) provides that:

“An employee employed under a contract of employment for a fixed-term of two years or more is not entitled to a redundancy payment in respect of the expiry of that term without its being renewed (...) if, before the term expires, the employee has agreed in writing to exclude any right to a redundancy payment in that event.”

This article will discuss the developing case law surrounding the two key areas of contention in the interpretation of these provisions: what constitutes a fixed-term contract and whether a renewal of such a contract is a new contract, and therefore must be for a minimum period of one year (or two years in the event of redundancy payment waiver) in order for a waiver to be valid, or whether such a renewal merely has the effect of continuing the original contract, thereby enabling an exclusion to be effective regardless of the length of the extension, providing that taken overall until termination the contract is for one year or more, or two years or more, as appropriate. The recent amendments to domestic legislation are discussed as are European measures to regulate various forms of “atypical work,” and fixed-term working in particular, in so far as they point up the lack of domestic regulation over such contracts and the need for future legislative measures.

Although the case law to which reference is made was decided under provisions contained in a variety of statutes dating from 1965,¹⁵ the relevant provisions under discussion are currently contained in the Employment Rights Act 1996, which consolidated, *inter alia*, individual employment legislation contained in the Employment Protection (Consolidation) Act 1978, and commenced on 22nd August, 1996. Throughout the following discussion, those provisions applicable to the 1996 Act have been used regardless of when, and the statute under which, the case was decided.

¹⁵ The Industrial Relations Act 1971; the Redundancy Payments Act 1965; the Contracts of Employment Act 1963 and 1972; the Trade Union and Labour Relations Act 1974 and the Employment Protection (Consolidation) Act 1978. Note should be taken that the provisions relating specifically to fixed-term contracts have undergone a series of “consolidations,” and restatements. The provisions relating to the written terms of employment were completely replaced in 1993 for the purpose of implementing Directive 91/533. For the purposes of this article there would appear to be no substantive difference between the pre and post 1993 version.

II. WHAT CONSTITUTES A FIXED-TERM CONTRACT?

A fixed-term contract is not defined in the 1996 Act and the matter fell for consideration, in its pre 1996 form, in *British Broadcasting Corporation v. Dixon*.¹⁶

In reversing the earlier Court of Appeal decision in *British Broadcasting Corporation v. Ioannou*,¹⁷ the Court held that a contract that is to expire at the end of a given period is a fixed-term contract notwithstanding that it provides for termination by notice by either party within the term. To decide otherwise “would mean that an employer could always evade the [1996] Act by inserting a simple clause ‘determinable by one week’s notice’.” As Lord Denning pointed out:

“That can never have been the intention of the legislature at all. The words ‘a fixed term’ must include a specified stated term even though the contract is determinable by notice within its term.”

The B.B.C. unsuccessfully argued that there was no dismissal, and therefore no right to claim unfair dismissal, since employment had come to an end merely by expiry of a contract which was not a fixed-term contract because of the notice provision contained within it: there could, therefore, be no deemed dismissal under what is now the E.R.A. 1996 section 95.

This interpretation by the Court of Appeal in *Dixon* of the term “fixed-term contract” remains the law today and the matter has not since then been controversial. There has, however, been some controversy as to whether a “task contract” – a contract that comes to an end upon the completion of a particular task, rather than at a predetermined date - is capable of being a fixed-term contract for the purposes of invoking the statutory provisions under consideration.

In *Wiltshire County Council v. National Association of Teachers in Further and Higher Education and Guy* Mr. Justice Phillips in the E.A.T. said that there was no reason why a contract of employment, the date of expiry of which could not be ascertained at the time the contract is created, could not be a contract for a “fixed term” and that a contract “for the duration of the present government” or “during the life of the present sovereign” or “for some other period capable of being determined by reference to a prescribed test” would be a contract for a fixed term.¹⁸ However, in *Ryan v. Shipboard Maintenance* this approach was doubted by Mr. Justice Kilner

¹⁶ [1979] I.R.L.R. 114, [C.A.].

¹⁷ *Supra* n.13.

¹⁸ [1978] I.R.L.R. 301 at 303, [E.A.T.].

Brown who said that a contract that is “indeterminate as to termination” was not capable of amounting to a “fixed-term contract.”

“There is no authority of which we are aware that allows for imprecision of termination in the context of an indefinite prolongation only determinable in the words used by Phillips, J ‘by exterior events’. Furthermore we take the view that it is stretching the meaning of the words beyond the intention of Parliament to say that it covers an event which can be identified in character but cannot be identified with a precise date in the future.”¹⁹

On appeal in *Wiltshire*, noting the disapproval expressed as to the reasoning by the E.A.T. in *Ryan*, Lord Denning, making reference to the Donovan Commission Report of 1968,²⁰ said:

“Although the Royal Commission recommended ‘particular purpose’ the legislature did not accept that recommendation. It limited the protection to contracts for a ‘fixed period’. It did not extend the protection to a contract ‘for a particular purpose’. ... A contract for a particular purpose, which is fulfilled, is discharged by performance and does not amount to a dismissal.”²¹

In addition, Lord Denning referred to his own judgment in *Dixon*, decided after the E.A.T. in *Wiltshire*, in which he said:

“The words ‘a fixed term’ must include a specified stated term even though the contract is determinable by notice within its term”

and noted that the Contracts of Employment Act 1972, section 4(4), [now the E.R.A. 1996, section 1(4)(g)] which provides that where the contract is a fixed-term contract, the employer must include within the statutory statement the date when it is to end, meant that “the legislature clearly thought that, in order to be a ‘fixed term,’ there had to be a date stated at the beginning when the contract will expire.”

Nevertheless, the Court of Appeal upheld the decision of both the Tribunal and

¹⁹ [1980] I.R.L.R. 16 at 18, [E.A.T.].

²⁰ *Royal Commission on Trade Unions and Employers' Associations 1965-1968*, Cmnd. 3623.

²¹ [1980] I.R.L.R. 198 at 200, [C.A.].

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E.A.T., that a lecturer's contract, which specified that it was 'for the session 1976/77,' was, on an "intelligible and sensible view"²² a fixed-term contract because the lecturer was employed for the academic session which started at the beginning of the autumn term and came to an end on the last day of the summer term: it contemplated a clear ending which could be identified at the outset of the contract.

Lord Denning's judgment in *Dixon*²³ and *Wiltshire County Council v. National Association of Teachers in Further and Higher Education and Guy*,²⁴ regarding the basis of identifying a fixed-term contract, and hence permitting non-renewal to be dismissal under the E.R.A. 1996, sections 95 and 136, remains good law today.

As explained by Mr. Justice Mummery (President) in *Pfaffinger v. City of Liverpool Community College* and *Muller v. Amersham & Wycombe College*, the combined effect of the E.R.A. 1996 section 136(1)(b), which mirrors section 95 and treats non-renewal of a fixed-term contract as dismissal for redundancy purposes, and the E.R.A. 1996 section 139(1)(b), which provides that an employee is dismissed for redundancy where the reason for dismissal is that, *inter alia*, the requirements of the business concerned for employees to carry out work of a particular kind have ceased or diminished, meant that the lecturers concerned were redundant since the employer's reason for non-renewal was that the function of lecturing ceased or diminished from the beginning of the vacation until the start of the new term: "there is no teaching during that period and therefore no need for teachers. That is a redundancy situation."²⁵

Hence:

"... where there is a succession of fixed-term contracts which expire, there may be a dismissal for redundancy on the expiration of each contract. So, for example, where a part-time lecturer has three fixed-term contracts, one for each term during the academic year, he may be dismissed three times during that year for redundancy. This may sound surprising to some but, on the present state of the authorities and the legislation, that is the position."²⁶

²² *Ibid*, per Lord Denning at 200 para. 22.

²³ *Supra* n.16.

²⁴ *Supra* n.21.

²⁵ [1996] I.R.L.R. 508, [E.A.T.].

²⁶ *Ibid* at 512 per Mummery, J. (President).

This decision was based on the earlier Court of Appeal decision in *Lee v. Nottinghamshire County Council*, in which, in interpreting equivalent provisions in the Redundancy Payments Act 1965, the Court held that in the case of expiry and non-renewal of a fixed-term contract it was necessary to ask: "Why was not the employee's contract renewed?"²⁷ If, in the case of a teacher, the answer was that there was no more work to do that was, as pointed out by Lord Justice Eveleigh, still a redundancy even though the failure to renew was foreseen right from the beginning.

The E.A.T. in *Pfaffinger* noted that the Tribunal held, on an application of the House of Lords' decision in *Ford v. Warwickshire County Council*,²⁸ that in view of the E.R.A. 1996 section 212(3)(b), which provides that where an employee is "absent from work on account of a temporary cessation of work," his employment is deemed to be continuous, the period of absence not breaking continuity, but also counting towards continuity, the entire period of employment was therefore continuous. This means that upon expiry of the final contract term the employee can rely on the entire period of employment, including those periods between contracts, in order to bring themselves within the time thresholds for unfair dismissal and redundancy, and to increase quantum, since compensation is calculated by a multiple of pay and the period of employment. Nevertheless, that, said the E.A.T. in *Pfaffinger*, did not have the effect of preventing the expiration of a fixed-term contract from being a dismissal, or the circumstances being a redundancy situation within the statutory definition.

III. RENEWAL OR CONTINUATION OF THE SAME CONTRACT?

Where the employee is employed on a succession of fixed-term contracts and the final contract is for less than the one or two year period, as appropriate, controversy has surrounded the question of whether a waiver in that final contract is then effective or whether the final contract must be for the periods required in the E.R.A. 1996, section 197(1)&(3).

In *British Broadcasting Corporation v. Ioannou* the Court of Appeal held that the final contract, not being for two years or more, did not fall within the statutory provisions, at that time contained in the Redundancy Payments Act 1965 and the Trade Union and Labour Relations Act 1974, even though it contained a waiver.²⁹

²⁷ [1980] I.R.L.R. 284, [C.A.].

²⁸ [1983] I.R.L.R. 126, [H.L.].

²⁹ *Supra* n.13.

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However, the reasoning differed as between the majority, Lord Justices Stephenson and Geoffrey Lane, and Lord Denning. The majority, in following the reasoning of the National Industrial Relations Court [N.I.R.C.], held that the final contract was, on the facts, a re-engagement under a new contract of employment rather than a renewal of an existing contract of employment. On this basis, the final contract needed to be for a period of two years or more in order for the employee to be able to effectively contract out of his rights. Lord Denning, on the other hand, said that:

“I do not think it is necessary ... to inquire whether there is a ‘renewal’ of a previous contract of employment or a ‘re-engagement’ under a new contract of employment. That is to fine a distinction for ordinary mortals to comprehend. Suffice it to say that you must always take the final contract which expires, and on the expiration of which he claims redundancy payment or compensation for unfair dismissal. If the final contract is for a fixed term of two years or more, it is permissible for the employee in writing to agree to exclude his rights, so long as he does it before the term expires. If the final contract is for less than two years, as for instance for a fixed term of one year, then he cannot exclude his right. It matters not whether the final contract is a renewal or re-engagement. It is the final contract alone which matters in this regard. ...”³⁰

In *Ioannou* the Court of Appeal held that there was no fixed-term contract at all, so it would appear that discussion on the test to be applied in relation to the term of the contract for the purposes of section 197 was *obiter*. However, in *Open University v. Triesman*³¹ the dictum of Lord Denning in *Ioannou*³² was followed by the E.A.T. Mr. Justice Phillips said:

“At the end of the day we have come to the conclusion that we should follow the observations of the Master of the Rolls ... not only because they are of high persuasive authority, but because, after considering the arguments addressed to us, we respectfully agree with them.”

³⁰ *Supra* n.13 at 186, para.14.

³¹ [1978] I.R.L.R. 114, [E.A.T.].

³² *Supra* n.13.

Triesman was followed by the E.A.T. in *Richards v. BP Oil Ltd.* where Mr. Justice Browne-Wilkinson J., the President of the E.A.T., put the argument thus:

“The crucial question is: does one look at the whole term of the original contract plus extensions as one contract or does one concentrate attention solely on the last contractual arrangement made between the parties? We can see no ground for distinguishing *Open University v. Triesman* on that point.”³³

The Court in both *Triesman* and *Richards* were attracted to “the Denning test” because of its simplicity and for the certainty it offered. In *Triesman* Mr. Justice Phillips said, “the validity or otherwise of exclusions of this character should so far as possible be easy to determine. For that reason a simple test is desirable.” Likewise, in *Richards* Mr. Justice Browne-Wilkinson said that, “in the interests of orderly industrial relations, it is undesirable for us to depart from that (*Open University v. Triesman*) decision and therefore we follow it.”

However, in *Mulrine v. University of Ulster* the Northern Ireland Court of Appeal disagreed with the application of Lord Denning’s reasoning, holding that the proper approach was to ask whether, on a true construction of the documents, the employee’s contract was extended or renewed for the further period, in this case four months, or was a re-engagement under a new contract.³⁴ As long as the last contract was merely an extension or renewal of the previous contract, as opposed to a re-engagement under a new contract, the waiver would be valid to oust jurisdiction of the tribunal no matter what the length of the extension, providing that overall the contract had been for a period of more than two years. It was held that the contract had been, not for a four month period, but for two years and four months and therefore the waiver in the final renewed contract was valid so as to oust the jurisdiction of the tribunal.

Lord Justice MacDermott in rejecting the application of a single and simple test and referring to the decision of Mr. Justice Phillips in *Open University v. Triesman*,³⁵ said:

“There is no doubt that Phillips J was attracted by the fact that Lord Denning’s test was a simple one, which avoided the drawing of fine

³³ EAT/768/82, 12th April, 1983 (unreported).

³⁴ *Supra* n. 14.

³⁵ *Supra* n. 31.

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distinctions between extensions which are renewals and those which are not but are mere re-engagements. Sadly, despite all the original anxiety to keep the work of industrial tribunals simple and free from legal complication, experience has shown, and the various series of reported cases confirm, that the work of a tribunal often does involve questions of law. I, for my part, share the view that, if possible, matters should be kept simple, but I do not accept that the Courts for that reason should introduce a test which can lead to a distorted meaning having to be given to agreements freely entered into."

The decision in *Mulrine*, although persuasive only, led to the need for employers, as well as tribunals, to consider in all cases the fine point as to whether the continuation of a fixed-term contract was a renewal of a previous term or merely re-engagement under a new contract. If the continuation is found to be a re-engagement under a new contract then that final contract needs to comply with the E.R.A. section 197 and be for a term of one year or more, or two years or more, in order for any waiver to be valid such as to oust the right to claim unfair dismissal or redundancy compensation when it is itself not renewed. On the other hand, if the final term is found to be an extension or renewal of the existing contract, the length of the final term is not of significance in determining the validity of the waiver.

In *Mulrine* the initial term was two years, which was held to have been extended by four months, leading to a contract for two years and four months.³⁶ The waiver in the extended four month contract was therefore valid for the purposes of the equivalent provision of the E.R.A. 1996 section 197. However, what was not addressed was whether, if the second period is held to be an extension of the first, the period of the extension can be added to the first period to constitute a contract that complies with the requirements of section 197: for example, can a contract of seven months, held to have been extended for six months, form a contract for "one year or more" and thus, if it contains a waiver it will be valid. Another point to consider on the *Mulrine* test is whether, if the second period is an extension of the first it is necessary for a waiver to be incorporated at all in the second contract, or whether the employer in such a situation could rely on the contractual term of the "master contract."

There followed a period of a flurry of case law on the issue of the status of the second contract and the application of the "Denning test." In *Housing Services Agency v. Cragg* a redundancy payments case, the E.A.T. noted the conflicting

³⁶ *Supra* n.14.

authorities and subjected the statutory waiver provisions to detailed scrutiny.³⁷ They concluded that the “final contract test” or the “Denning test” propounded by Lord Denning in *Ioannou*, was correct in so far as it related to an unfair dismissal waiver since section 197(1) required the waiver to appear in the final contract which must be for a period of one year or more in order to be effective. Mr. Justice Peter Clark said:

“... we accept the final contract test propounded by Lord Denning and followed in *BP* in so far as it relates to unfair dismissal waiver. Questions of renewal and re-engagement are not too difficult; they are simply irrelevant when considering unfair dismissal waiver.”

However, in so far as a redundancy payment waiver is concerned, the E.A.T. concluded that *Ioannou* was wrongly applied in *Open University v. Triesman*,³⁸ a redundancy payment case, since the E.R.A. 1996 section 197(3)-(5) required that there must be a waiver agreement both in relation to the original fixed-term contract and during the currency of each extension of the fixed term, there being no requirement for each extension to be for a period of two years, since it is the first contract that is in question.

The Court held that, in connection with an unfair dismissal waiver, the following requirements must be met:

“(1) There must be a fixed-term contract. It is immaterial that it contains a notice provision (Dixon).

It must be for a term of one year or more. It is not permissible to aggregate successive fixed terms so as to amount to one year or more.

(2) There must be a term of the contract, or separate agreement (s.197(4)) entered into before the expiry of the fixed term excluding the right to claim unfair dismissal. No question of consideration arises in a contractual sense. It is sufficient that there is an agreement made between the parties in writing to that effect.

(3) If dismissal, consisting of the expiry of the fixed term without its being renewed (on the same terms) (s.95(1)(b); s.197(1)(a)) occurs, the employee is excluded from the right to bring a complaint

³⁷ [1997] I.R.L.R. 380, [E.A.T.].

³⁸ *Supra* n.31.

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of unfair dismissal under s.94(1).

(4) If there is no dismissal under A(4) above, the parties must start again. Whether by renewal or re-engagement, if the employment continues for a further fixed term, that must be for a term of one year or more, and there must be a waiver agreement complying with s.197(4) entered into before the expiry of the new term (s.197(1)(a)).”

As to a redundancy payment waiver, Mr. Justice Peter Clark said that under the E.R.A. section 197(3)-(5) there must be a waiver agreement both in relation to the original fixed-term contract *and* during the currency of each extension of the fixed term, but that if the term as renewed had to be for a period of two years or more, there would be no need for section 197(5), which does not specify any period for the renewed fixed term. Section 197(5), which provides that:

“Where –

(a) an agreement such as is mentioned in subsection (3) is made during the currency of a fixed term, and

(b) the term is renewed, the agreement shall not be construed as applying to the term as renewed; but this subsection is without prejudice to the making of a further agreement in relation to the renewed term”

applies only to section 197(3) waiver agreements, and not to section 197(1) unfair dismissal waivers. It was held that what is envisaged, and was envisaged by the original Redundancy Payments Act, was that where an employee enters into a fixed-term contract for two years or more with a waiver agreement, if that term is renewed for a further fixed period of whatever duration, provided he entered into a fresh waiver agreement during the currency of the extended term, he was precluded from claiming a redundancy payment on expiry of that term without a further renewal. The length of the extended term was not relevant, neither was the fact that the term may have been an extension or a mere re-engagement.

The position was summarised thus:

“(1) There must be a fixed-term contract as in ... (1) above.

(2) It must be, in the first instance, for a term of two years or more.

It is not permissible to aggregate successive fixed terms so as to

amount to two years or more.

(3) Before the expiry of the fixed term under (2) above, the parties must enter into a waiver agreement as defined in s.197(4).

(4) If dismissal, consisting of the expiry of the fixed term without its being renewed (on the same terms) (s.136(1)(b); s.197(3)) occurs, the employee is excluded from the right to bring a claim for a redundancy payment under s.135(1).

(5) If there is no dismissal under (4) above because either the contract is renewed or he is re-engaged on different agreed terms (see s.138), then, if the original *fixed term* is renewed for a further fixed term (see s.235(1)), whether for a period of two years or less, and during that extended term the parties enter into a s.197(4) waiver agreement, then dismissal arising out of the expiry of the original fixed term as extended will not give rise to a claim for a redundancy payment (s.197(3) read with (5)).”

Mr. Justice Peter Clark went on to say that:

“It may be said that by drawing, we think for the first time, a clear distinction between the unfair dismissal and redundancy payment waiver provisions, that will create an anomaly. Hitherto, employers have proceeded on the basis that there is no material distinction (save for the one-and-two-year terms) between the two. So be it.

...³⁹

This “final contract test” was confirmed as appropriate to unfair dismissal by the E.A.T. in *BBC v. Kelly-Phillips* where the purported unfair dismissal waiver was held to be invalid because the last in a series of fixed-term contracts under which an employee worked was not for a year or more as required by the E.R.A. 1996, section 197(1).⁴⁰ With regard to the argument put forward by the respondent, that, notwithstanding that the final term was for under four months, the contract of employment from which Ms Kelly-Phillips had been dismissed was, by a succession of renewals, one for a fixed-term which had begun with the start of the first contract and which expired when the relationship came to an end. Mr. Justice Lindsay said that in the case of unfair dismissal, what is now the E.R.A. 1996 section 197(1)

³⁹ *Supra* n.37 at 386.

⁴⁰ [1997] I.R.L.R. 571, [E.A.T.].

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provides merely that Part X of the 1996 Act does not apply to dismissal from employment under a contract for a fixed-term of a year or more: it makes no mention of renewal or extension and consequently the word 'renewal' has no place in the construction of section 197(1).⁴¹

Although these decisions move away from the simplicity of the "Denning test" as being applicable to both unfair dismissal and redundancy cases, an examination of the statutory provisions leads one to conclude that Mr. Justice Peter Clark in *Housing Services Agency v. Cragg*⁴² and Mr. Justice Lindsay in the E.A.T. in *BBC v. Kelly-Phillips*⁴³ were correct in relation to the question of unfair dismissal. Nevertheless, the use of the "Denning test" in relation to unfair dismissal was thrown into doubt in *Bhatt v. Chelsea and Westminster Health Care Trust* when Mr. Justice Kirkwood rejected it and held that a fixed-term contract of one year or more could be renewed or extended for less than a year and still successfully contain a waiver and therefore fall within the exclusion from the right to bring an unfair dismissal claim under section 197(1).⁴⁴

In such a case Mr. Justice Kirkwood reasoned that the point of focus for the purposes of section 197(1) is not the final extension, but the term of the extended contract. Section 95(1)(b), he said, envisaged that the term could be renewed without a new contract being made, but with the old contract continuing. It was therefore necessary to distinguish whether there was a renewal of the term under the old contract, an extension, or whether the renewal was under a new contract. Where the only change was an extension of the fixed-term, there was an extension under the same contract with no dismissal, dismissal occurring only when the final extension was not renewed. If the extended contract, in the sense referred to, was for a fixed term of one year or more then the contract would fall within section 197.

In Mr. Bhatt's case the final period of employment was for three months, thus on the "Denning test" it fell outside the requirements of section 197 in that it was not a contract "for a fixed term of one year or more." However, since Mr. Bhatt's extended contractual period dated from the original date of employment, 1st June, 1985, to his dismissal by operation of section 95(1)(b), which occurred on 31st January, 1996, it was held that he was unable to claim unfair dismissal since he was employed (overall) for a period in excess of a year: the waiver was, therefore,

⁴¹ It should be noted that in Autumn, 1999 Mr. Justice Lindsay succeeded Mr. Justice Morison as President of the E.A.T..

⁴² *Supra* n.37.

⁴³ *Supra* n.12.

⁴⁴ [1997] I.R.L.R. 660, [E.A.T.].

effective to oust the jurisdiction of the tribunal.

When *BBC v. Kelly-Phillips* came before the Court of Appeal⁴⁵ the reasoning of the E.A.T. in *Bhatt* was approved, along with that of the majority in the Court of Appeal in *Ioannou*⁴⁶ and the Northern Ireland Court of Appeal in *Mulrine*.⁴⁷ Lord Justice Peter Gibson, in giving the leading judgment, disapproved of the E.A.T. decision and reasoning in *Housing Services Agency v. Cragg*, of which he said:

“To suggest that the previous cases had overlooked the differences between unfair dismissal waiver and redundancy payment waiver is rather bold. There is no reason why in construing the relevant provisions consistency should not be sought.”⁴⁸

It was held that under section 95(1)(b), which provides that there is a dismissal if:

“he is employed under a contract for a fixed term and that term expires without being renewed under the same contract”

there can be an extension of the term without there being a new contract and that thereafter the term of the contract is the extended term, and so on, so that dismissal does not occur until the extended term is not, in fact, extended further. Applying that reasoning to the facts it was held that Ms Kelly-Phillips entered into a contract for one year commencing on 4th September, 1994. This was varied in August, 1995 by the extension of the contract beyond its expiry date until 31st December, 1995 with all the provisions of the contract continuing in force, including a waiver clause, save for the amendment relating to the term. The extension, it was held, was therefore under the same contract as that entered into in September, 1994 and there was no dismissal, dismissal occurring under the varied contract which was for an extended fixed-term of one year or more when the extended term expired on 31st December, 1995 without being renewed.

As the initial term of the fixed-term contract was for a year, the question did not arise as to whether, had the initial term been for less than one year, the contract could have acquired the status of a contract for a year or more by accumulating the periods from the extended terms of the same contract. In *Bhatt* although the original

⁴⁵ *Supra* n.12.

⁴⁶ *Supra* n.13.

⁴⁷ *Supra* n.14.

⁴⁸ *Supra* n.12 at 299.

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term was for a year or more, the E.A.T. expressed the view that the original or initial term must be for a fixed-term of one year or more and could not acquire this status merely by adding the extensions together. It is, however, submitted that on the reasoning put forward by the E.A.T. in *Bhatt* and by the Court of Appeal in *Kelly-Phillips* it is possible to do so. There is, however, some uncertainty, Lord Justice Peter Gibson, in *Kelly-Phillips* expressing the view that the term of the contract in that case was either that provided for under the extension (September, 1995 to December, 1995) or the extended term (September, 1994 to December, 1995). He did, however, say:

“Although I recognise that there may be potential for the abuse of the exemption by fixed-term contracts being extended repeatedly, I am not persuaded that that justifies giving the statutory wording a gloss which otherwise it could not bear. Employees must give their consent to the extensions and to the waivers, though I accept that they may at times have little choice if they are to keep their jobs. But ultimately it is for Parliament to correct if this interpretation of the existing statutory language is seen to lead to abuse.”⁴⁹

It should be noted, however, that in *Cragg* the E.A.T. held that in the first instance the contract must be for a term of two years or more and that it is not permissible to aggregate successive terms so as to amount, in that case, to a contract of two years or more.

IV. DEVELOPING EUROPEAN LAW

Although there have been a number of attempts by the European Commission, dating back to the early 1980s, to regulate various forms of atypical work, these have been largely unsuccessful because of the need for unanimity and objections raised by both the United Kingdom and Danish Governments.⁵⁰ The only measure to be successfully adopted was Directive 91/383,⁵¹ the purpose of which is to ensure

⁴⁹ *Ibid* at 299, para. 38.

⁵⁰ Nine draft directives were put forward by the Commission between 1982 and 1990. See M. Jeffrey, “Not really going to work? Of the Directive on part-time work, ‘atypical work’ and attempts to regulate it” (1998) 27:3 *I.L.J.* 193.

⁵¹ Council Directive 91/383/EEC of 25th June, 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship being based on Article 118A, which is

that those working under either a fixed-term or a task contract are afforded the same level of health and safety at work protection as that of other workers in the user undertaking and/or establishment.⁵² However, following further unsuccessful attempts at agreement on regulating "atypical working" on a whole-Community basis, in 1995 the Commission utilised the social dialogue procedure agreed under the Social Policy Agreement annexed to the Maastricht Treaty, from which the United Kingdom had "opted-out," in order to progress the issue.⁵³ This procedure resulted in an agreement limited to part-time working and under the procedure laid down in what is now Article 139 of the E.C. Treaty,⁵⁴ was adopted as a Directive.⁵⁵

Pending the coming into force of the Amsterdam Treaty the Directive was extended to the United Kingdom by an extension directive.⁵⁶

In the preamble to the Agreement on part-time working the social partners stated that "it is the intention of the parties to consider the need for similar agreements relating to other forms of flexible work." Negotiations commenced in March, 1998 and a draft Framework Agreement on fixed-term work was reached in January, 1999 and following approval of the respective social partners' statutory bodies a Framework Agreement was concluded in March, 1999.⁵⁷ The Agreement was subsequently adopted as a Directive,⁵⁸ and this brings into effect the Framework

subject to qualified majority voting in Council.

⁵² See *supra* n.5 at p.14.

⁵³ Protocol 14 on Social Policy. Following the U.K. agreement to "opt-into" the Agreement on Social Policy it was incorporated into the Treaty of Amsterdam, which came into force on 1st May, 1999, from which time the Agreement on Social Policy, as Articles 136-139, forms part of the new Treaty.

⁵⁴ Formerly Article 4.2 of the Social Policy Agreement.

⁵⁵ Directive 97/81/EC of 15th December, 1997 concerning the Framework Agreement on part-time work concluded by U.N.I.C.E., C.E.E.P. and the E.T.U.C., to be implemented in Member States no later than 20th January, 2000. See now The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, S.I. 2000/1551.

⁵⁶ Council Directive 98/23/EC of 7th April, 1998, Article 2 of which specifies that it is to be implemented in the U.K. by 7th April, 2000. The original Directive, 97/81/EC, which is to be brought into force by 20th January, 2000, does not extend to the United Kingdom.

⁵⁷ See IRLB 588, (March 1998) at pp.14-17 and IDS Employment Europe 449, (May 1999) at pp.10-16. For discussion of the potential domestic implications of this measure see P. Lorber, "Regulating fixed-term work in the United Kingdom: a positive step towards workers' protection" (1999) 15:2 *The International Journal of Comparative Labour Law and Industrial Relations*, at pp.121-135.

⁵⁸ Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by E.T.U.C., U.N.I.C.E. and C.E.E.P., formerly approved by the Council on 28th June, 1999.

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Agreement on fixed-term work, the purpose of which is two-fold, as stated in clause 1:

- “(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
- (b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships”

and sets out to do so by application of the principle of non-discrimination. To this end clause 4(1) provides that fixed-term workers shall not be treated less favourably than comparable permanent workers, which means a worker in an employment relationship of indefinite duration, solely because they have a fixed-term contract or relationship. However, as with the Agreement on part-time work, different treatment can be justified on objective grounds. In addition, the principle of equal treatment is subject to the principle of *pro rata temporis* (clause 4.2) so that the principle of equal treatment may be achieved by rights being in proportion to the hours worked.

Where there are periods of qualifying service for particular conditions of employment these are to be the same for fixed-term and permanent workers, differences are, however, permitted where these are justified on objective grounds.

Employers are required to ensure that fixed-term workers have the same opportunity to secure permanent positions as other workers and to provide information about vacancies (Clause 6.1). Employers are also required, but only as far as possible, to facilitate access to training opportunities in order to enable fixed-term workers to enhance their skills, career development and occupational mobility (Clause 6.2).

The Agreement applies to all fixed-term workers, with the exception of those placed by a temporary work agency⁵⁹ but provides for derogation in so far as those undertaking vocational training or apprenticeship schemes, or employment contracts concluded within the framework of a public or publicly-supported training scheme are concerned (Clause 2.2). The definition of a fixed-term worker extends beyond the existing United Kingdom definition, as developed through the case law, in that in addition to applying to those working under an employment contract, it also applies to an employment relationship where this is entered into directly between an employer and a worker. In addition, the contract is “fixed-term” not only where the relationship is determined by reference to a specific date but also by other objective criteria, including the completion of a specific task, or the occurrence of a specific event.

⁵⁹ See Preamble to the Agreement which is annexed to Directive 1999/70/EC.

V. SUMMARY

The position that emerges from the United Kingdom domestic case law outlined above now appears to be that, in so far as unfair dismissal is concerned, where a contract is extended for a period of less than a year it can still be a contract for a year or more for the purpose of section 197(1), thus permitting a waiver to be valid, since it is the whole period of the contract which is to be considered: an extended term being part of the original contract as envisaged by section 95(1)(b). Indeed, it is argued that the cases permit the initial term of the contract to be for less than a year, gaining the status of a contract for a year or more by extensions that cumulatively amount to a year or more, provided only that the extension is on the same terms as the original contract. This means that relatively short term contracts are capable of amounting to fixed-term contracts when looked at cumulatively.

Quite where this leaves the law in so far as redundancy is concerned is unclear. Of the cases discussed above only *Open University v. Triesman*⁶⁰ and *Housing Services Agency v. Cragg*⁶¹ concerned a claim for a redundancy payment in the face of a waiver. *Triesman*, in which the E.A.T. adopted the "Denning test," has been dismissed as a simplistic judgment, as noted by the Court of Appeal in *Kelly-Phillips*, and by expressly agreeing with the decision and reasoning of the Northern Ireland Court of Appeal in *Mulrine v. University of Ulster*⁶² it is argued that the Court was, by implication, disagreeing with the reasoning in *Triesman*. In *Cragg* although the E.A.T. rejected the application of the "Denning test" to cases of redundancy, the Court held that in the first instance the contract must be for a term of two years or more and that it is not permissible to aggregate successive terms so as to amount to two years or more.

In formulating the "final contract" test in *British Broadcasting Corporation v. Ioannou*⁶³ Lord Denning expressed the view that distinguishing between "renewal" and "re-engagement" under a new contract of employment was "to fine a distinction for ordinary mortals to comprehend." As recognised by Lord Justice MacDermott in *Mulrine v. University of Ulster*,⁶⁴ the consequent "Denning" or "final contract" test had the advantage of simplicity in that it avoided the "drawing of fine distinctions

⁶⁰ *Supra* n.31.

⁶¹ *Supra* n.37.

⁶² *Supra* n.14.

⁶³ *Supra* n.13.

⁶⁴ *Supra* n.14.

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between extensions which are renewals and those which are not but are mere re-engagements.” Subsequent case law, in moving away from the Denning test” has demonstrated that the distinction is indeed “too fine” to comprehend.

This is an area which is of concern on a practical level to employers and employees alike and the lack of clarity demonstrated through the case law discussed above is unhelpful, undesirable and confusing. It now appears to be so confused that it would clearly benefit from an appeal to the House of Lords in order to clarify the law and it is argued that at a time of concern to simplify and speed up tribunal proceedings, as evidenced by the Employment Rights (Dispute Resolution) Act 1998, such lack of clarification will inevitably lead to litigation, the outcome of which will be unpredictable.⁶⁵

In the meantime, however, in the White Paper *Fairness at Work* the Government made the point that whilst fixed-term contracts allow employers to engage people to work on short-term tasks or jobs which have a fixed duration, there is potential for abuse in that some employees are obliged to accept fixed-term contracts and to waive their employment rights for what are really open-ended jobs.⁶⁶ Of the three options identified “for tackling this problem,” promoting best practice by encouraging employers to limit the use of waivers; restricting the waiver to redundancy payments; complete prohibition of waiver clauses; the option favoured is expressed as “prohibiting the use of waivers for unfair dismissal but allowing them for redundancy payments,” the reasoning being that:

“[s]hort-term workers know when they start work that their job will come to an end on an agreed date and do not therefore have the same claim for redundancy compensation when it finishes. In contrast, such employees can reasonably expect to be as protected against unfair dismissal as permanent employees.”⁶⁷

Following a period of consultation this preferred option is now contained in the Employment Relations Act 1999, section 18, which provides for the repeal of the E.R.A. 1996, section 197, and thus the ability to “opt-out” of the right to bring proceedings for unfair dismissal. Section 18(1)–(5) of the 1999 Act was brought into force on 25th October, 1999 for dismissals where the effective date of termination

⁶⁵ See case note on the Court of Appeal decision in *B.B.C. v. Kelly-Phillips* – R. White, “Waiver of statutory rights in fixed term contract” (1998) 27 *I.L.J.* 238 at p.241.

⁶⁶ *Supra* n. 10.

⁶⁷ *Ibid* at para. 3.13.

falls on or after that date.⁶⁸ However, waivers will remain valid in respect of the right to seek a redundancy payment and in relation to unfair dismissal where the effective date of termination falls on or after 25th October, 1999 where the fixed-term contract, or the renewal or most recent renewal, and the waiver were entered into before that date.

There is a complete lack of protection in the United Kingdom against abuse in the use of fixed-term contracts, in regard to both the initial engagement and to successive renewals. In addition, continuation of the ability to "opt-out" of the right to receive a redundancy payment is unique to those working under a fixed-term contract. Whilst at the level of the European Communities the Framework Agreement envisages the "normalisation" of temporary work by the introduction of the principle of non-discrimination "unless different treatment is justified on objective grounds,"⁶⁹ it does not challenge the spread of such contracts nor provide the "fully-fledged scheme of *portability of entitlement*" which Murray argues needs to recognise a whole range of working arrangements, conditions and rights.⁷⁰

Nevertheless, where there are no equivalent legal measures to prevent abuse from the successive use of fixed-term contracts, under the Framework Agreement Member States are required to introduce either measures providing for a test of objective justification for renewal, the maximum total duration of successive fixed-term contracts or the number of renewals and to determine under what conditions fixed-term contracts shall be regarded as "successive." Since the Framework Agreement is drafted along similar lines to the Framework Agreement on part-time work, implementation of the principle of less favourable treatment may well proceed in the same way as that for part-time workers, provisions for which are contained in sections 19-21 of the Employment Relations Act 1999. Section 19 provides for regulations to be made for the purpose of securing that persons in part-time

⁶⁸ The Employment Relations Act 1999 (Commencement No. 2 and Transitional and Saving Provisions) Order 1999. The first commencement order made under the 1999 Act brought into force, *inter alia*, s.18(6) which rectifies an oversight whereby dismissals for a reason falling within the E.R.A. 1999, s.99 (pregnancy or childbirth) and s.104 (assertion of a statutory right) were the only two automatically unfair dismissals where employees could waive their unfair dismissal rights.

⁶⁹ It should be noted that this is in the context of what many might regard as a controversial proposition set out in the preamble to the Agreement to the effect that "Whereas employment contracts of an indefinite duration are a general form of employment relationships and contribute to quality of life of the workers concerned and improve performance."

⁷⁰ J.Murray, "Normalising temporary work: the proposed Directive on fixed-term work" (1999) 28:3 *I.L.J.* at pp.269-275 (September).

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employment are treated no less favourably than persons in full-time employment for the purposes of implementing Directive 97/81/EC on the Framework Agreement on part-time work and, following consultations, for the issuing of a code of practice. A timetable for implementing these provisions rests with the Secretary of State.⁷¹

Whilst the Framework Agreement on fixed-term work excludes those placed by a temporary work agency at the disposition of a user enterprise, the preamble expresses "the intention of the parties to consider the need for a similar agreement relating to temporary agency work." Domestically, principally because of a lack of mutuality and the casual nature of the relationship, agency workers have been held not to be in an employment relationship with their agency,⁷² nor with the organisation to which they are assigned.⁷³ They have thus been excluded from the main bulk of employment protection rights that apply only to those working under a "contract of employment." However, the Court of Appeal recently held that, notwithstanding that a temporary worker did not have employee status under his general terms of engagement, he can have the status of employee of the employment agency in respect of each assignment actually worked, bringing agency workers into the definition of fixed-term worker.⁷⁴

Although at this stage reform in relation to fixed-term contracts has been woefully limited, the trend domestically has been towards an extension of the "floor of rights" to "atypical workers." Both the National Minimum Wage Act 1998 and the Working Time Regulations 1998, as well as the Public Interest (Disclosure) Act 1998, which provides protection for in the event of a "protected disclosure," extend beyond the normal narrow definition of "worker" or "employee."⁷⁵ The Government signalled an intention in *Fairness at Work* to "similarly extend the coverage of some or all existing employment rights"⁷⁶ and the E.R.A. 1999, section 23, represents the vehicle for doing this in that it gives the Secretary of State powers to extend employment rights contained in the main statutes⁷⁷ to individuals not currently

⁷¹ The Employment Relations Act 1999 (Commencement No. 2 and Transitional and Saving Provisions) Order 1999.

⁷² *Wickens v. Champion Employment* [1984] I.C.R. 365, [E.A.T.].

⁷³ *Construction Industry Training Board v. Labour Force Ltd.* [1970] 3 All E.R. 220, [H.C.].

⁷⁴ *McMeechan v. Secretary of State for Employment* [1997] I.R.L.R. 353, [C.A.].

⁷⁵ The National Minimum Wage Act 1998, s.34; Working Time Regulations, Reg. 36; the Employment Rights Act 1996, s.43K, inserted by the Public Interest (Disclosure) Act 1998, s.230.

⁷⁶ *Supra* n.10 at para. 3.18.

⁷⁷ The Trade Union and Labour Relations (Consolidation) Act 1992; the Employment Rights Act 1996; the Employment Relations Act 1999 and any instrument made under s.2(2) of the European

covered by the various statutory protections, such as agency and casual workers. In any event, the successor to the Commission's 1998-2000 Social Action Programme⁷⁸ is widely expected to include specific provisions touching upon outsourced work and agency workers and these matters have already been addressed in the Commission's recent study into termination of the employment relationship.⁷⁹

Communities Act 1972.

⁷⁸ COM (98) 259 final of 29th April, 1998.

⁷⁹ *Termination of employment relationships: Legal situation in the Member States of the European Union*, April, 1997.